APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 23875

FRITZ B. WAGOR, JOHN L. AVANT, ET AL,
as Trustees of Dade County Construction
Industry Advancement Fund,

Appellants,

versus

CAL KOVENS CONSTRUCTION CORPORATION,

Appellee.

Appeal from the United States District Court for the Southern District of Florida

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(July 17, 1967)

Before GEWIN and AINSWORTH, Circuit Judges, and LYNNE, District Judge.

LYNNE, District Judge: Appealing from a summary judgment entered in favor of appellee, Cal Kovens Con-

struction Corporation (Kovens), appellants, as Trustees of the Dade County Construction Industry Advancement Fund (Trustees), are here contending that the lower court erred in disregarding settled principles both of the common law of contracts and of the emerging national labor law.

There is no genuine issue as to any material fact. On July 1, 1963, a collective bargaining agreement was entered into between the Carpenters' District Council of Miami, Florida and Vicinity (Carpenters' Union) and South Florida Chapter, The Associated General Contractors of America, Inc. and Home Builders Association of South Florida (Associations). It established working conditions, wages and fringe benefits for union carpenters employed in Dade County.

With respect to benefits, especially noteworthy are provisions of the agreement requiring the employer to pay to the Dade County Construction Employees Health and Welfare Trust Fund (Health and Welfare Fund) ten cents for each hour worked by his employees and to the Dade County Construction Industry Advancement Fund (Industry Fund) two and one-half cents (increased to five cents after July 1, 1964) for each hour worked. The Health and Welfare Fund is jointly administered by trustees separately appointed by the Carpenters' Union and the Associations and provides health and welfare benefits to employees. The Industry Fund provides funds for specified purposes to advance the construction industry and is administered by the Trustees who are appointed exclusively by the Associations. The Carpenters' Union has no participation in or control over the Industry Fund and has no voice in determining how the funds therein are to be expended.

The Trustees lean heavily upon the provisions of paragraph 2, article VIII of the agreement which read as follows:

> "The parties hereby agree that the terms and conditions set forth in this Agreement shall be the same with any Employer irrespective of their membership or nonmembership in said Associations; and no more favorable terms or conditions will be given to any Employer during the term of this Agreement."

Kovens has never been a member of either Association; it has never designated either as its bargaining representative. It did not participate in the negotiation of nor did it sign such agreement. On the contrary, it elected to negotiate with the Union on its own. The resulting contract, though apparently never reduced to writing and formally executed, enabled it to employ union carpenters and required it to pay and provide identical wages and fringe benefits. It was not thereby required to make contributions to the Industry Fund.

Invoking the common law principles of ratification by acceptance and estoppel, appellants insist that appellee should be held to have adopted the contract negotiated by the Associations and to have breached its obligation to contribute to the Industry Fund. This contention will not withstand analysis. At no time did it deliberately enter into relations with the Carpenters' Union which were only consistent with the adoption of such contract. *Cf. Wiggins Ferry Co. v. O. & M. Railway*, 142 U.S. 396 (1892). On the contrary, its separate agreement with the Union, while providing for payments into the Health and Welfare Fund,

omitted any reference to contributions to the Industry Fund. Neither the Union nor its members have any interest in such fund, and appellants are not seeking to vindicate the rights of either. Moreover, inconsistent with the theory of adoption is the mute fact that it has never contributed to such fund. Thus, on its facts, this case is clearly distinguishable from *William Dunbar & Co. v. Painters and Glazers District Council*, 129 F.Supp. 417 (D.D.C. 1955), on which appellants misplace their chief reliance.

Adverting to the duty of the lower court to fashion the substantive law of this case from the policy of our national labor laws, as taught by *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1959) and its progeny, appellants complain that its decision herein undermines the industrial stability achieved through employer associations. They contend that there is a federal labor policy favoring multi-employer associations as collective bargaining units and that uniform conditions of employment are essential to their continued existence. Thus, their argument runs, they must be clothed with quasi-legislative authority to impose their collective bargaining agreements upon nonconsenting employers within the industry.

While there is nothing in the national labor laws reflecting adversely upon the existence of such units, *Labor Board v. Truck Drivers Union*, 353 U.S. 87 (1957), there is nothing which has been called to our attention, or which we have found, which prefers them to a non-member employer choosing to go it alone in negotiating with a labor union. Indeed, the signposts point in the opposite direction. For example, in *Terminal Assn. v. Trainmen*, 318 U.S. 1, 7 (1943), it was observed:

> "The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions . . . . The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions."

Again, in *Labor Board v. American Ins. Co.*, 343 U.S. 395 (1952), the Supreme Court made it clear that section 8(a) of the Labor-Management Relations Act (29 U.S.C.A. § 158(d) does not permit either the government or a union to impose unilaterally on an employer certain terms and conditions of employment. It follows, a fortiori, that it does not suffer the unilateral imposition of contractual obligations by an association of employers upon a nonmember, competing employer.

Any federal policy favoring the multi-employer bargaining unit over the individual employer electing to act alone or promoting uniform terms and conditions of employment for an entire industry must await its promulgation by the Congress. It cannot and must not be postulated by this court.

Insisting that payments made by Kovens into the Health and Welfare Fund under its informal agreement with the Carpenters' Union were in patent violation of 29 U.S.C.A. § 186, appellants urge us to absolve it of criminality by holding that in law, if not in fact, it became a

party to the written agreement negotiated by the Associations with such Union. The mere statement of this contention points up its lack of merit; it deserves no fuller discussion.

Finally, relying upon the above-quoted provisions of article VIII of their agreement with the Carpenters' Union, appellants argue that failure to require Kovens to contribute to the Industry Fund as a condition of its employment of union labor resulted in giving to it "more favorable terms or conditions" and constituted a clear breach of such agreement. But assuming, without deciding, that this is so, it does not follow that a breach of its contract by the Union may be transmuted into a contractual obligation which appellee expressly declined to assume.

The judgment of the district court was right. It is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23875

FRITZ B. WAGOR, JOHN L. AVANT, ET AL,
as Trustees of Dade County Construction
Industry Advancement Fund,
Appellants

vs.

CAL-KOVENS CONSTRUCTION CORPORATION,
Appellee

Appeal from the United States District Court for the Southern District of Florida

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(October 11, 1967)

ON PETITION FOR REHEARING

Before GEWIN and AINSWORTH, Circuit Judges, and LYNNE, District Judge

PER CURIAM:

In the preparation of its opinion the court gave careful consideration to the principles articulated in *Lewis v. Seanor Coal Co.*, F.2d , 66 LRRM 2007, 2010-2011 (3d Cir. 1967) and *Moglia v. Geoghegan*, 267 F.Supp. 641 (D.C. N.Y. 1967). The petition for rehearing is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1966

No. 23875

D. C. Docket No. 65-155-Civ-EC

FRITZ B. WAGOR, JOHN L. AVANT, ET AL.,
as Trustees of Dade County Construction
Industry Advancement Fund,
Appellants,

versus

CAL KOVENS CONSTRUCTION CORPORATION,
Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

Before GEWIN and AINSWORTH, Circuit Judges, and LYNNE, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here

ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Fritz B. Wagor, John L. Avant, and others, as Trustees of Dade County Construction Industry Advancement Fund, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

July 17, 1967

Issued as Mandate: October 19, 1967

FINAL JUDGMENT FOR DEFENDANT

Filed May 23, 1966

In the United States District Court, in and for the Southern District of Florida, Miami Division.

Fritz B. Wagor, et al., *Plaintiffs*,

vs. No. 65-155-Civ-EC.

Cal Kovens Construction Corporation, a Florida corporation, *Defendant*,

This Cause came on to be heard on Motions for Summary Judgment and the Court entered its Summary Judgment in favor of the Defendant and against the Plaintiffs. Based thereon it is hereby

Considered, Ordered and Adjudged that Final Judgment be and the same is hereby entered in favor of the Defendant, Cal Kovens Construction Corporation, a Florida corporation, and against the Plaintiffs, Fritz B. Wagor, John L. Avant, William H. Bourne, Edward J. Gerrits, Allan W. Greenberg, Paul B. Martin, Sam Jennings, Jack Cook, C. C. Blake, Robert L. Turchin and Lowell B. Selby, as Trustees of Dade County Construction Industry Advancement Fund, a trust, and this cause is hereby dismissed with prejudice to the Plaintiffs.

Done and Ordered at Miami, Florida, this 21st day of May, 1966.

EMETT C. CHOATE,
Senior Judge, U. S. District Court.

APPENDIX B

The relevant provisions of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C. 151, *et ceq*) are as follows:

> SEC. 1(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.
>
> It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.
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> * * * *
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> SEC. 301(a) Suits for violation of contracts be-

tween an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * * *

SEC. 302(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce . . .

* * * *

SEC. 302(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

SEC. 302(c)(5) The provisions of this section shall not be applicable . . . with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial

umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; or (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training program: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds.

SEC. 302(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.